

SVEA COURT OF APPEAL
Department 02
Division 020105

JUDGMENT
4 December 2014
Stockholm

Case No.
T 2610-13

CLAIMANT

MHH AS
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Norway

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RESPONDENT

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MATTER

Challenge of arbitration award given in Stockholm on 19 December 2012

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal rejects the motions of the claimant.
2. MHH AS is ordered to compensate Axel's Konsult och Förvaltning AB for its litigation costs in the amount of SEK 325,000, plus interest on the amount pursuant to Section 6 of the Swedish Interest Act from the day of the Court of Appeal's judgment until the day of payment. The entirety of the costs relate to costs for legal counsel.

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SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

BACKGROUND

On 16 June 2010, MHH AS (MHH) and Axel's Konsult och Förvaltning AB (the Axel Company) entered a share purchase agreement (the Agreement). Through the Agreement, MHH acquired all shares in the company Hagforsgruppen AB, which subsequently changed name to Nygård AB (the Company). The Company provides care and treatment for drug addicts at a treatment center in Hagfors municipality. The acquisition was completed on 1 July 2010.

In January of 2012, the Axel Company opened arbitration proceedings against MHH. The sole arbitrator was advokat LP. The Axel Company moved that the arbitrator should order MHH to pay SEK 3,718,750 to the Axel Company corresponding to the outstanding part of the purchase price under the Agreement. MHH disputed the Axel Company's motion, but attested that the amount was reasonable in and of itself. In the arbitration, MHH moved, for its part, in a cross-action, that the arbitrator should order the Axel Company to pay SEK 6,281,280 to MHH. The Axel Company disputed MHH's cross-action. The claim asserted by MHH in the cross-action amounted to a total amount of SEK 10,000,000, from which SEK 3,718,750 would be set off against the Axel Company's claim for the outstanding part of the purchase price. MHH's claim was for damages caused by "uncovered breaches of the representations and warranties" of the Agreement. The Axel Company disputed the motion for set off as well as the cross-action.

On 19 December 2012, the arbitration award was issued. Through the arbitration award, the arbitrator ordered MHH to pay SEK 2,823,574 to the Axel Company (item 1 of the operative part of the award). The arbitrator rejected MHH's motion for set off in excess of the amount SEK 895,176 (item 2 of the operative part of the award) as well as MHH's cross action (item 3 of the operative part of the award). MHH's claim for compensation for arbitration costs and litigation costs were also rejected (item 4 of the operative part of the award). The arbitration award also ordered MHH to compensate the Axel Company for its litigation costs to a certain amount

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

(item 5 of the operative part of the award) and MHH was further ordered to, as between the parties, compensate the Axel Company for its costs for covering the arbitrator's fees (item 7 of the operative part of the award).

MOTIONS ETC.

MHH AS has moved that the Court of Appeal shall annul items 1-5 and 7 of the operative part of the arbitration award given between the parties in Stockholm on 19 December 2012.

The Axel Company has objected to the annulment of the arbitration award.

The parties have claimed compensation for litigation costs.

Pursuant to Section 1 of Chapter 53 and item 5 of the first paragraph of Section 18 of Chapter 42 of the Swedish Code of Judicial Procedure, the Court of Appeal has decided the case without a main hearing.

THE PARTIES' RESPECTIVE GROUNDS

MHH

MHH has maintained the following. The arbitrator's mandate is set out in the recitals of 26 September 2012 provided to, and approved by, the parties plus the addenda set out in the minutes from the final hearing of the arbitration proceedings on 22 November 2012. The arbitrator exceeded his mandate by rendering the arbitration award based on legally relevant circumstances, which had not been referenced by the parties. By interpreting the Agreement without a mandate from the parties and without granting the parties the opportunity to present their views on the interpretation, procedural errors occurred that were not caused by MHH. If the arbitrator had not acted in this manner, then MHH's objection based on set off and its cross-action would likely have been successful, either wholly or at least to a larger extent than as concluded by the arbitrator. Both the excess of mandate and the procedural errors thus likely affected the outcome of the case.

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

MHH has, as the Court of Appeal understands MHH's case, specified the arbitrator's excesses of mandate and procedural errors as follows.

The representations and warranties

1. The arbitrator exceeded his mandate by reducing the "warranties" provided in the Agreement to "provisions" and interpreting them as such although the Axel Company had not objected to MHH's assertion that they were "warranties" and how they should be interpreted.
2. The arbitrator exceeded his mandate by basing his interpretation of the warranties of the Agreement on circumstances that had not been referenced by the Axel Company, such as "the respondent's lawyers had drafted the agreement" and that "Mr. RO [...] had limited insight into the actual legal meaning of the various provisions and warranties of the Agreement" (paragraph *J41* of the arbitration award).
3. The arbitrator interpreted the meaning of the term warranties of the Agreement in violation of the parties' instruction, which follows from the parties not having voiced differing opinions on the interpretation of the warranties. This constitutes a procedural error. The arbitrator did not clarify to the parties that he did not consider himself bound by their opinion that the provisions were in fact warranties and that he reserved the right to interpret them. This also constitutes a procedural error.

Warranty A – the Framework Agreement with Kriminalvården (the Prison and Probation Service)

4. The arbitrator exceeded his mandate by basing his decision on the unreferenced circumstance that Section 2.4 of the Agreement covered the agreements with, amongst others, Kriminalvården applicable at the time of signing the Agreement between MHH and the Axel Company (paragraph *J15* of the arbitration award).
5. The arbitrator exceeded his mandate *by* basing his decision on the unreferenced circumstance that it, already from the wording of the

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

Agreement, including its appendices, is evident that the framework agreement with Kriminalvården would expire in April of the following year *and by* interpreting Section 2.4 of the Agreement in reference to “the wording of the Agreement and the function of the framework agreement”, despite that the Axel Company in support of its objections had only referenced external factors (paragraph *J16* of the arbitration award).

6. The arbitrator exceeded his mandate *by* unilaterally interpreting Section 2.4 of the Agreement against the background of the provision’s placement in the Agreement and that there was no sanction connected to the provision, *and by* basing the conclusion on the fact that there was no support in the investigation that the Axel Company had made any guarantees with respect to any future continuation for the cooperation with Kriminalvården (paragraph *J18* of the arbitration award).

7. The arbitrator exceeded his mandate by basing his decision on the unreferenced circumstance that there were no legal grounds in support of MHH’s claim for compensation for breaches of warranty or deficient prerequisites (paragraph *J19* of the arbitration award). The arbitrator did not apply the principle *jura novit curia* when considering whether the circumstances referenced by MHH entailed the right to compensation for the deficient prerequisite of the Agreement. This constitutes a procedural error.

8. The arbitrator exceeded his mandate by basing his decision on the unreferenced circumstance that the right to compensation is exhaustively governed by the Agreement and only covers those warranties that had been agreed (paragraph *J19* of the arbitration award).

9. The arbitrator interpreted Section 2.4 of the Agreement in breach of the parties’ instruction. During the arbitration the parties did not voice differing opinions on how this part of the Agreement should be interpreted. This constitutes a procedural error. The arbitrator failed to grant the parties the opportunity to argue their opinions on the correct interpretation of this part of the Agreement, which also constitutes a procedural error.

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

Warranty B – An accurate and complete budget

10. The arbitrator exceeded his mandate by basing his decision on the unreferenced circumstance that Mr. RO had not had grounds to assume more stringent requirements by the authorities, in particular from Kriminalvården (paragraph *J61* of the arbitration award).

11. The arbitrator exceeded his mandate by basing his decision on the unreferenced circumstance that the Agreement does not include any provisions on sanctions or other circumstance providing that the provisions of the Agreement should be deemed exhaustive (paragraphs *J62* and *J63* of the arbitration award). The arbitrator failed to grant the parties the opportunity to argue their opinions on whether this was of any relevance to the interpretation of the Agreement, which constitutes a procedural error.

12. The arbitrator exceeded his mandate by basing his decision on the unreferenced circumstance that Kriminalvården's materially changed procedures prior to the procurement of 2011 caused a deviation between the budget and actual outcome (paragraph *J62* of the arbitration award).

13. The arbitrator interpreted the Agreement in this respect in violation of the parties' instruction, which follows from the fact that they did not voice differing opinions on the interpretation. This constitutes a procedural error.

Warranty E – Complete and accurate information

14. The arbitrator exceeded his mandate by basing his decision on the unreferenced circumstance that there must be a connection between the breaches identified by the arbitrator, set out in paragraph *J41* of the arbitration award, and the missing cooperation with Kriminalvården (paragraphs *J43-J49* of the arbitration award).

The Axel Company

The Axel Company has presented the following position to MHH's challenge.

The arbitrator did not exceed his mandate in any respect, and no procedural errors occurred. In the event that the Court of Appeal would find that

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

procedural errors occurred, then MHH caused the procedural errors through its silence. In the event that the Court of Appeal would find that the arbitrator exceeded his mandate or that procedural errors occurred, that did not likely affect the outcome of the arbitration.

The arbitrator sent the recitals and the minutes for the parties to comment. Neither of them objected to the contents. At the same time, the Axel Company's objections are not fully accounted for in the arbitration award. The contents of the arbitration award correspond to the recitals and the minutes, and are based on the other procedural content referenced by the parties both in writing as well as orally.

The mandate of the arbitrator was to resolve the dispute between the parties. The recitals of the arbitration award do not constitute the mandate. In the arbitration, the parties did not provide specific instructions to the arbitrator, and they were granted the opportunity to argue their respective cases to the extent guaranteed by law.

Within the scope of his mandate, the arbitrator was to interpret the "warranties". The interpretation of the Agreement made by the arbitrator falls within the scope of his mandate. The parties cannot through any joint approach concerning the "provisions" or "warranties" be deemed to have instructed the arbitrator on how the "warranties" should be understood.

The arbitrator did not base his interpretation on circumstances that had not been referenced in the arbitration. MHH's objection on the inaccurate interpretation is aimed at the arbitrator's review of the merits, and that is not subject to challenge.

The arbitrator did not consider circumstances that had not been referenced by the parties in reaching his conclusions.

In the event that MHH had been of the opinion that the "warranties" entailed strict liability, it was for MHH to clarify this during the arbitration.

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

THE PARTIES' FURTHER DETAILS

MHH

The arbitrator's mandate

The mandate of the arbitrator is set out in the recitals sent to the parties and approved by them on 26 September 2012, with the addenda set out in the minutes from the main hearing of the arbitration on 22 November 2012. The circumstances referenced by the Axel Company in support of its disputing MHH's motions in the arbitration are exhaustively listed in the recitals, paragraphs *F1-F20* of the arbitration award.

The warranty provisions (challenge grounds 1-3)

In support of its case in the arbitration, MHH referenced breaches of warranty by the Axel Company. The arbitrator recounted these in items A-F in paragraph *E2* of the arbitration award. As provided by paragraph *E2*, MHH asserted that the referenced provisions constituted warranties. The grounds for the Axel Company's objections, paragraph *F2*, provide that the company "attests that the provided warranties were restated correctly". Except for warranty F of the Agreement, which is related to equity, the Axel Company did not object that the warranties upon which MMH sought compensation were inapplicable as maintained by MHH. Thus, the parties agreed that these provisions were in fact warranties and, consequently, the Axel Company was strictly liable for breaches thereof.

In the arbitration, it was clear between the parties that the arbitrator's mandate was to resolve whether the Axel Company had breached the warranties provided under the Agreement. Thus, the Axel Company did not question MHH's assertions that they were in fact warranties and how they should be interpreted. By reducing the "warranties" to "provisions" and interpret them as such, the arbitrator stripped the warranties of their actual legal status, namely that negligence on the part of the provider of the warranty is irrelevant for the liability of the provider in case of a breach of warranty

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

under the Agreement. Further, the arbitrator based his interpretation on circumstances which had not been referenced by the Axel Company – for example, the fact that “the Respondent’s lawyers had drafted the agreement” and that “Mr. RO [...] had limited understanding of the legal meaning of the various provisions and warranties of the Agreement” (paragraph *J41* compared to paragraphs *F1-F20* of the arbitration award). The arbitrator’s interpretation of what he designated as “provisions” was never discussed by the parties in the arbitration. Through his interpretation, the arbitrator went beyond what had been referenced by the parties in support of their respective cases. This interpretation violates the contradictory principle. The incorrect interpretation, which affected the outcome of the case, is set out in paragraphs *J18, J19, J32, J38, J41* and *J62* of the arbitration award. Due to the nature of the error, which must be deemed material, and since a fundamental procedural principle was ignored, it must be presumed that the error affected the outcome of the case.

During the arbitration, the parties did not voice differing opinions on the correct interpretation of the warranties of the Agreement. Thereby, the parties must be deemed to have provided the arbitrator with an instruction as to how the warranties should be understood. The arbitrator was not entitled to deviate from this instruction and of his own accord interpret the meaning of the warranties. Through this interpretation, the arbitrator committed a procedural error, which was not caused by MHH, and that likely affected the outcome of the case. In any event, the arbitrator was obliged to clarify to the parties that he did not consider himself bound by the parties’ opinion that they were in fact warranties, and that he consequently reserved the right to interpret them. By not doing so, the arbitrator denied the parties the opportunity to present their opinions with respect to this interpretation, which constitutes a procedural error.

Warranty A – The framework agreement with Kriminalvården (challenge grounds 4-9)

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

In the arbitration, MHH asserted the following. The Axel Company had warranted that a prerequisite for the operations was the Company's agreement with Kriminalvården. However, already when the agreement was entered it was ruled out, or at least unlikely, that the agreement would be extended. Thereby, the Axel Company misled MHH on the preconditions of the acquisition and thus caused the company a loss corresponding to the value of the agreement with Kriminalvården. The objections raised by the Axel Company in the arbitration were the following (paragraphs *G28-G32* of the arbitration award). The circumstances that lead to the agreement with Kriminalvården not being extended relate to deficiencies arisen after the transfer. The low index became known only in December of 2010. The reasons had been brought to MHH's attention prior to the acquisition. The reason that a new agreement could not be entered with Kriminalvården was that no one from the Company initiated the required contacts with Kriminalvården. If the Company had managed the operations adequately, it would have been possible to enter a new agreement with Kriminalvården.

The arbitrator concluded (paragraph *J15* of the arbitration award) – as far as can be gathered from the arbitration award – that the provision set out in Section 2.4 of the Agreement covered the agreements, including the one with Kriminalvården, that were in effect at the time of the entry of the agreement, and that the condition consequently had been fulfilled. The grounds were “that from a formal point of view, the issue is actually that the Company has failed to achieve a new framework agreement with Kriminalvården to apply from April of 2011 and thereafter”. However, the Axel Company did not reference any circumstance to the effect that the provision of Section 2.4 was fulfilled since the agreement with Kriminalvården was applicable at the time of the entry of the agreement (compare paragraphs *F1-F20* of the recitals of the arbitration award). By considering such an unreferenced circumstance when reaching his decision, the arbitrator exceeded his mandate.

The arbitrator further maintained (paragraph *J16* of the arbitration award) that the wording of the Agreement, including its appendices, provide that the framework agreement with Kriminalvården would expire in April of the

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

following year. This is not provided in the documentation submitted in the arbitration and to which MHH had access, and in paragraph *J7* of the arbitration award, it is noted that the appendices had not been submitted in the arbitration. The arbitrator interpreted Section 2.4 of the Agreement restrictively against the background of “the Axel Company’s categorical objection to liability both under this provision as well as otherwise”. The arbitrator added that “the wording of the Agreement and the function of the framework agreement support the Claimant’s objections with respect to the interpretation”. The arbitrator is incorrect. As set out in the recitals, the Axel Company did not dispute liability by referring to the wording of the Agreement, but only by referring to external factors. Thus, the Axel Company did not at all object to MHH’s interpretation of the Agreement (cf. paragraphs *F1-F20* of the arbitration award). By considering these unreferenced circumstances in its grounds, the arbitrator exceeded his mandate.

The arbitrator interpreted (paragraph *J18* of the arbitration award) Section 2.4 of the Agreement against the background of its placement in the Agreement and that there was no sanction directly linked to the provision. This was introduced by the arbitrator. Further, the arbitrator found that nothing in the investigation supporting that the Axel Company would have guaranteed the continued future cooperation with Kriminalvården. Also this was introduced by the arbitrator. Thereby, the arbitrator exceeded his mandate. In any event, the fact that the arbitrator neglected to grant the parties the opportunity to argue their points of view on the correct interpretation of the Agreement constitutes a procedural error.

The Axel Company did not object to MHH’s claim for compensation for breaches of warranty or failing prerequisites, on other grounds than that they had either occurred after the completion or that Mr. RO had informed MHH thereon prior to the acquisition. Thus, the Axel Company did not object to the claims on the grounds that there were no legal arguments for them. It was the arbitrator, who of his own accord concluded that the legal arguments entailed that the motion could not be granted (paragraph *J19* of the arbitration award). This constitutes an excess of his mandate. In any event, it was the arbitrator’s

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

obligation, pursuant to the principle of *jura novit curia*, to review whether the circumstances referenced by MHH entitled it to compensation for the deficient prerequisite for the Agreement. Thereby, the arbitrator committed a procedural error.

The arbitrator also stated (paragraph *J19* of the arbitration award) “that in the Agreement, there is a contractual arrangement, i.e. agreed warranties and related provisions, and that the Respondent has failed to motivate why this would not be exhaustive.” As the arbitrator must be understood, MHH could thus not receive compensation under the provisions of Section 2.4 of the Agreement due to a circumstance of the meaning that the right to compensation is exhaustively regulated in the agreement, and only covers the warranties agreed in the Agreement. The Axel Company did not reference such a circumstance. Therefore, the arbitrator was not entitled to base his decision on that circumstance. Thus, the arbitrator exceeded his mandate.

Within the scope of his mandate, the arbitrator was not entitled to interpret Section 2.4 of the Agreement. During the arbitration, the parties did not voice differing opinions on the interpretation of this provision of the Agreement. Thereby, the parties must be deemed to have given the arbitrator an instruction on how to understand that provision. The arbitrator was not entitled to deviate from that instruction and of his own accord interpret the meaning of the provision. By making his own interpretation a procedural error occurred.

Warranty B – A correct and complete budget (challenge grounds 10-13)

In the arbitration, MHH maintained that the budget was based on grossly incorrect conditions both with respect to expected earnings as well as personnel costs and that the actual income deviated from budget. This, according to MHH, constitutes a breach of warranty. Against this, the Axel Company objected the following (paragraphs *F10* and *G21* of the arbitration award). The increase in personnel costs to SEK 5.5 million from SEK 3.65 million is not attested in reference to the Company’s following completion having paid salaries in excess of the applicable collective bargaining

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

agreement or that were not required, which negatively affected the result. Following the completion, the Company has failed to adequately manage marketing and thereby did not acquire potential customers. Actual income and costs are not attested, since the Axel Company did not know the underlying factors. The budget was realistic and was based on many years of experience of the business.

According to the arbitration award (paragraph *J61* of the arbitration award), it had not been established that Mr. RO was aware or ought to have been aware of the radically increased demands posed by the authorities, by Kriminalvården in particular, and which would apply to the business following completion. Thereby, the arbitration award must be understood so that the Axel Company has no liability for the deviation from budget, since it had no knowledge of these changes. The Axel Company did not object to liability for the deviation from budget by asserting that Mr. RO had lacked grounds to expect the radically increased demands. By basing the arbitration award on this circumstance, the arbitrator exceeded his mandate.

In the arbitration, MHH maintained that the Axel Company in Section 7c of the Agreement had provided a warranty for the correctness of the budget. Paragraph *J62* of the arbitration award provides that the arbitrator in his interpretation of this provision deemed it important that the Agreement does not include any “clear provision on sanctions related” to Section 7c. As the arbitration award must be understood, the arbitrator based his conclusion in paragraph *J63* on this fact. Since the Axel Company did not reference that the Agreement does not include any provisions on sanctions or other circumstance to the effect that the provisions of the Agreement were exhaustive, the arbitrator exceeded his mandate. In any event, the arbitrator should have asked the parties whether this circumstance had any relevance for the interpretation of the Agreement. As he failed to do so, a procedural error occurred.

The arbitrator also stated (paragraph *J62* of the arbitration award) that, based on the investigation, the main cause for the deviation between budget and

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

actual result is Kriminalvården's radically changed procedures leading up to the procurement of 2011. The changed procedures were not referenced by the Axel Company. Thus, by basing his decision on this unreferenced circumstance the arbitrator exceeded his mandate.

Within the scope of his mandate, the arbitrator was not entitled to interpret the Agreement in the manner done in paragraph *J62*. During the arbitration, the parties never voiced differing opinions on the correct interpretation of the Agreement in this respect. Thereby, the parties must be deemed to have given the arbitrator an instruction on how the Agreement should be understood. The arbitrator was not entitled to deviate from this instruction and of his own accord interpret the Agreement. By the arbitrator's interpreting the Agreement, a procedural error occurred.

Warranty E – Complete and correct information (challenge grounds 14)

In the arbitration, MHH maintained that the Axel Company had breached warranty E (paragraph *E2* of the arbitration award) by Mr. RO, prior to the Agreement having been entered, failing to inform that Socialstyrelsen had carried out an audit on 8 June 2010 and that there were material defects in the operations (paragraphs *E7* and *G16* of the arbitration award). The operations had, according MHH, as a result thereof a lower value compared to what MHH had reason to suspect. The Axel Company disputed that material information had been withheld and asserted that the outcome of Socialstyrelsen's audit was unknown at the time of completion (paragraphs *F17-F18* of the arbitration award). The Axel Company further objected that the remarks presented following the audit were caused by insufficient staffing, as well as the increased demands following Socialstyrelsen's taking over the supervisory role (paragraph *G17* of the arbitration award). The Axel Company also disputed that any serious remarks had been presented, since the remarks had not resulted in any injunction and that the warranty did not mean that the operations would be free from any form of critique (same paragraph as aforementioned).

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

The arbitrator concluded (paragraph J41 of the arbitration award) that it was impossible to not notice that compared to the requirement of completeness as per the date of the Agreement, there were certain deficiencies and that the Axel Company was liable for these. Due to the uncovered breaches of warranty under the Agreement, i.e. due to breach of contract, MHH in the arbitration claimed compensation for costs for rectification as well as decreased enterprise value. Despite this, the arbitrator concluded (paragraph J42 of the arbitration award) that there must be a connection between the breaches set out in paragraph J41 and the discontinued cooperation with Kriminalvården. Neither party had referenced this. The arbitrator's conclusion in paragraphs J43-J49 of the arbitration award is thus unrelated to the case brought by MHH and is further unrelated to the circumstances referenced by the Axel Company. Thereby, the arbitrator exceeded his mandate.

The Axel Company

The arbitrator's mandate

The circumstances referenced by the Axel Company in support of its objections in the arbitration are not exhaustively listed in the recitals of the arbitration award. All information, both documentary and oral, presented in the arbitration constitutes procedural material. The recitals is not a description of the assignment. There is no legal requirement to produce recitals. The parties did not give any specific instructions to the arbitrator. Instructions can only be given jointly by the parties. This was not done. The arbitrator's mandate was to resolve the dispute between the parties.

The warranty provisions (challenge grounds 1-3)

The wording of items A-F of paragraph E2 of the arbitration award is correctly restated and the label "warranty" was used for them. However, the Axel Company objected to liability and disputed MHH's proposed application of the Agreement in these respects. At no point did MHH assert that the liability was strict. Thus, the Axel Company did not agree with MHH

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

that the provisions constituted warranties coupled with strict liability. In the arbitration, the Axel Company attested that MHH had correctly restated the “warranties”, but not how they should be interpreted. Against the background of the Axel Company’s objection to any liability in the arbitration, the arbitrator was obliged to interpret the provisions. The Axel Company, which in the arbitration had disputed any and all liability, was not obliged to provide counterarguments.

The arbitrator did not treat the warranties as provisions in the sense maintained by MHH. Already in the minutes from the main hearing did the arbitrator label items A-F as “agreement provisions” which could give the right to a reduction of the purchase price or compensation for damages. MHH did not object thereto, but explicitly approved the contents of the minutes. The “warranties” were never defined, instead the expression was merely used as a practical label for the said items. In the arbitrator’s interpretation connected to reaching his decision, a review of whether each respective provision or warranty entailed strict liability or not was carried out in compliance with the principle of *jura novit curia*.

MHH’s claim that incorrect interpretations are set out in paragraphs *J18*, *J19*, *J32*, *J38*, *J41* and *J62* of the arbitration award cannot be aimed at anything but the arbitrator’s review of the merits, and that is not subject to challenge.

Items A-F were customarily interpreted by the arbitrator. This did not preclude the arbitrator from, pursuant to the principle of *jura novit curia*, to conclude that one or several of the items provided strict liability irrespective of negligence. In paragraphs *J58* and *J69* of the arbitration award, the arbitrator reviewed the Axel Company’s strict liability, i.e. irrespective of negligence. The arbitrator did not pose a general requirement of negligence.

The arbitrator did not base his interpretation on circumstances that had not been referenced in the arbitration. MHH’s then project manager, Mr. CF, was heard as a witness and stated that it was MHH’s legal counsel that had drafted the agreement. It was further clear from the hearing of Mr. RO that he had

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

limited insight in the legal-technical aspects of the Agreement. These circumstances were thus brought into the case through the witness statements.

Even if an excess of mandate would have occurred, this did not affect the outcome, since MHH's case could not have been successful. Irrespective of the interpretation of the word "warranty", in the arbitration MHH failed to establish that the alleged breaches of contract had been committed on the part of the Axel Company.

The parties cannot be deemed to have had a joint approach to the terms "provisions" or "warranties" and thereby have given the arbitrator an instruction on the how the warranties should be understood. The arbitrator is not at all obliged to clarify to the parties that he did not consider himself bound by their opinion that they constituted warranties, in particular since the parties did not hold such a joint understanding. Thus, no procedural error occurred in the arbitration.

Warranty A) – The framework agreement with Kriminalvården (challenge grounds 4-9)

It is correct that MHH in support of its case in this respect in the arbitration referenced the circumstances described in the arbitration award in paragraphs E2 and E4, and that the Axel Company raised the objections described in paragraphs G28-G32 of the arbitration award, including those MHH has referenced in these challenge proceedings. The restatement of the objections set out in the arbitration award is not, however, exhaustive. Thus, in the arbitration the Axel Company disputed MHH's assertions *that* the Axel Company had given a warranty to the effect that a prerequisite for the operations was the agreement with Kriminalvården, *that* it was clear already at the time the Agreement was entered that it was excluded or at least unlikely that the agreement with Kriminalvården would be extended, *and that* the Axel Company thereby had misled MHH on the conditions of the acquisition and caused the Company damage corresponding to the value of the agreement with Kriminalvården.

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

All circumstances upon which the arbitrator based his decision had been referenced by the parties. The arbitrator did not introduce any new circumstances in support of his interpretation. The Axel Company had disputed liability and the arbitrator was therefore obliged to interpret the Agreement and apply applicable provisions of law, even if they had not been referenced. And that is what he did. Part of the arbitrator's review was to interpret and determine the contents of the Agreement with a subsequent comparison to the circumstances referenced and proven in the arbitration. In these challenge proceedings, MHH has objected to the conclusions reached by the arbitrator when he considered what had been uncovered in the investigation during the arbitration, including information from the director general of Kriminalvården. The arbitrator's conclusions on the merits in these respects are not subject to challenge.

The arbitrator was not obliged to provide the parties the opportunity to argue their views on the correct interpretation of the Agreement.

Warranty B – A complete and correct budget (challenge grounds 10-13)

It is correct that MHH in the arbitration referenced that the budget was based on grossly incorrect conditions both as regards estimated income as well as personnel costs and that actual outcome deviated from budget and that this resulted in a breach of warranty. It is also correct that the Axel Company objected as set forth in paragraphs *F10* and *G21* of the arbitration award, however, the account of the Axel Company's objections is not exhaustive.

The conclusion as regards warranty B formed part of the arbitrator's mandate to interpret and apply the Agreement, particularly against the background that the Axel Company had disputed liability in this respect. Just as for warranty A, warranty B was not listed in the list of warranties of the Agreement. The arbitrator's review relates to the merits and is thus not subject to challenge.

The circumstances referenced by MHH in this respect in these challenge proceedings formed part of the procedural material in the arbitration. As regards Kriminalvården's altered procedures, they were introduced to the

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

arbitration through the witness statement referenced by both parties with
Kriminalvården's inspector Mr. AA.

Any possible excess of mandate or procedural error did not affect the
outcome of the case. Following the completion of MHH's acquisition, the
Axel Company was no longer liable for the agreement relationship with
Kriminalvården. At the time of the entry into the Agreement, on the
completion day and for a considerable time thereafter, there was a framework
agreement in place with Kriminalvården.

Warranty E – Complete and correct information (challenge grounds 14)

It is correct that MHH in the arbitration referenced the circumstances set forth
in paragraphs *E7* and *G16* as regards insufficient provision of information,
and that the Axel Company presented the objections set forth in paragraphs
F17, *F18* and *G17* of the arbitration award.

The arbitrator did not exceed his mandate with respect to this issue. The
arbitrator merely reviewed the objections raised by the Axel Company.

THE INVESTIGATION BEFORE THE COURT OF APPEAL

Documentary evidence has been referenced.

GROUND OF THE COURT OF APPEAL

The challenge of the arbitration award

Legal starting points

Section 34 of the Swedish Arbitration Act (1999:116) provides that an
arbitration award shall be wholly or partially annulled if the arbitrators have
exceeded their mandate (item 2) or if a procedural error occurred, without
having been caused by a party, which likely affected the outcome of the case
(item 6).

In arbitrations, the starting point is that the arbitrator is obliged to resolve the
dispute based on the circumstances referenced by the parties (see Government

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

Bill 1998/99:35 p. 143). If the arbitrator bases his decision on a circumstance that has not been referenced by a party, he should generally be deemed to have exceeded his mandate, albeit that certain caution should be had for international arbitrations (Government Bill 1998/99:35 p. 144). The word circumstance in this respect means an actual circumstance of direct relevance to the legal outcome, i.e. a legally relevant circumstance. In general, an arbitrator should be allowed to decide on a specific legally relevant circumstance provided it has been sufficiently clearly indicated as grounds for a certain legal consequence that it must have been understood by the counterparty (see Lindskog, *Skiljeförfarande, En kommentar*, 2nd ed., 2012, p. 722). When the parties during the arbitration have approved the recitals of the arbitration award, the starting point must be that the recitals in all material aspects reflect each party's respective case and that the parties reference the factual circumstances and raise those objections set out in the recitals, although all information that is introduced to the arbitration proceedings constitute procedural material (cf. Svea Court of Appeal's judgment of 1 December 2009 in case No. T 4548-08 and Lindskog, *op. cit.*, p. 540).

An evidentiary fact or supporting fact need not be referenced in the same manner as a legally relevant circumstance, however a party must have had reasonable grounds to expect that it might be taken into consideration. If an evidentiary fact or supporting fact has been introduced into the proceedings, the arbitrator is free to allow that fact to influence the evaluation of evidence, provided that a party would not be justifiably surprised thereby. (See Lindskog, *op. cit.*, p. 722.)

In general, a party is not obliged to counter the counterparty's assertions and failure to do so cannot be interpreted as attesting the asserted circumstances (see Heuman, *Skiljemannarätt*, 1999, p. 354). For an arbitrator to be disallowed from deciding whether a circumstance referenced by a party is legally relevant, the counterparty must have explicitly admitted the existence and accuracy thereof.

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

An arbitrator, just as public courts, is entitled to interpret agreements entered between the parties to the extent the review of the issues of dispute so require (see Government Bill 1998/99:35 p. 61). Also when interpreting the agreement, the arbitrator is bound by the legally relevant circumstances referenced by the parties, but is permitted to consider evidentiary facts and supporting facts in accordance with the description above. The alleged agreement between the parties constitutes a legally relevant circumstance. However, the interpretation of the agreement could be viewed as a particular kind of evaluation of evidence, in which the written agreement document constitutes an evidentiary fact whereas the contents of the document and the subject matter governed by the agreement constitute supporting facts determining the actual application of the agreement (see Ekelöf and Boman, *Rättegång* 4, 6th ed., 2004, p. 212). In his interpretation of an agreement, the arbitrator is generally not bound by the parties' actions as regards legal provisions and arguments, but is rather obliged to apply these also without them having been referenced by a party pursuant to the principle of *jura novit curia* (cf. Lindskog, *op. cit.*, p. 639).

The fact that an arbitrator has reached an issue of merit incorrectly, or has, with respect to the merits, interpreted an agreement incorrectly is not subject to challenge. However, errors with respect to the proceedings themselves, i.e. procedural errors, are subject to challenge. If an arbitrator has acted in violation of the parties' joint instructions a procedural error has occurred. In some cases, insufficient guidance of the proceedings by the arbitrator could constitute such an error (see Lindskog, *op. cit.*, p. 902).

The warranty provisions (challenge grounds 1-3)

In this respect, MHH has maintained that the arbitrator exceeded his mandate *both* by basing his decision on an interpretation of the "warranties" of the Agreement – items A-F of paragraph E2 of the arbitration award – which violated the interpretation on which the parties agreed in the arbitration *and* by considering unreferenced circumstances as the basis for his interpretation,

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

and that procedural errors occurred considering that the interpretation violated the parties instruction on the interpretation of the term “warranties”.

In the present case, it is undisputed that the parties had approved the recitals of the arbitration award and were offered the opportunity to comment on the minutes from the main hearing of the arbitration. In line with the Court of Appeal’s conclusion above, the starting point is thus that the recitals restate the legally relevant circumstances referenced by the parties and their respective positions with respect to the legally relevant circumstances referenced by the counterparty and that the recitals thus in this respect reflect the cases brought before the arbitrator.

The recitals provide that the Axel Company disputed all of MHH’s claims maintained in support of the motion for set off and the cross-action. In the Court of Appeal’s opinion, it is not possible from the recitals to infer that MHH asserted that the warranties were coupled to strict liability. Further, it is not evident from the Axel Company’s grounds for objection that it would have admitted that assertion. The fact that the Axel Company raised objections on other aspects than with respect to the interpretation can according to the Court of Appeal not be understood to mean that the parties agreed on a specific interpretation. Further, the other documentary evidence referenced by MHH before the Court of Appeal does not establish that the parties agreed on the correct interpretation of the warranties referenced by MHH. Under these circumstances, interpreting the agreement must be deemed to fall within the scope of the arbitrator’s mandate to resolve the dispute between the parties. The Court of Appeal has not found support in any respect for MHH’s assertion that the arbitrator in his interpretation considered unreferenced circumstances or evidentiary or supporting facts which had not been introduced to the procedural material.

Since, in the Court of Appeal’s opinion, it has not been established that the parties agreed that the term “warranties” of the Agreement should be interpreted in a specific manner, there is nothing in this respect that could be considered to constitute a joint instruction to the arbitrator. Further, the

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

arbitrator has not, as noted above, been precluded from interpreting the Agreement in the manner he did. Even if interpretation of the Agreement had not been discussed during the arbitration it cannot, having regard to the parties' procedural positions, be deemed surprising to the parties.

Thus, no excess of mandate or procedural error in the manner maintained by MHH in this respect has been established.

Warranty A – The framework agreement with Kriminalvården (challenge grounds 4-9)

In this respect, MHH has maintained that the arbitrator exceeded his mandate by considering unreferenced circumstances in his decision and by considering such circumstances when interpreting Section 2.4 of the Agreement. Further, MHH has maintained that procedural errors occurred, *because* the arbitrator did not apply the principle of *jura novit curia* in making his decision, *and because* he interpreted Section 2.4 of the Agreement in violation of the parties' instruction and without granting the parties the opportunity to argue their views on the interpretation of the Agreement in this respect.

As already noted by the Court of Appeal, an arbitrator may not, when interpreting an agreement within the scope of his mandate, consider legally relevant circumstances which have not been referenced. A corresponding preclusion does not generally apply to evidentiary and supporting facts. Above, the Court of Appeal has concluded that the arbitrator did not exceed his mandate by interpreting the Agreement *inter alia* in the now relevant respect. None of the circumstances against which MHH has objected in this respect are of the nature of legally relevant circumstances according to the Court of Appeal. All of the circumstances considered by the arbitrator were introduced to the arbitration in such a manner that it was possible for the arbitrator to consider them as interpretation data.

As regards MHH's assertion on procedural errors due to the fact that the arbitrator did not apply the principle of *jura novit curia*, the Court of Appeal notes that the arbitrator's conclusion, as it is set forth in paragraph *J19* of the

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

arbitration award, is that MHH had failed to prove that there existed a separate right for MHH to receive compensation for damages from the Axel Company. Considering this conclusion, the arbitrator's statement in the same paragraph – that detailed legal reasoning from MHH was missing – cannot be understood to mean that the arbitrator had failed to review MHH's claims in this respect.

For the same reasons as set out by the Court of Appeal as regards MHH's allegation on a joint instruction to the arbitrator on the correct interpretation of the term "warranties" of the Agreement, the Court of Appeal concludes that it has not been established that the parties in the arbitration expressed anything that could be understood as a joint instruction to the arbitrator on the interpretation of Section 2.4 of the Agreement. Further, there was no obligation for the arbitrator to grant the parties the opportunity to argue their views of the interpretation.

Thus, no excess of mandate or procedural error in the manner maintained by MHH in this respect has been established.

Warranty B – A correct and complete budget (challenge grounds 10-13)

MHH has in this respect maintained *that* the arbitrator exceeded his mandate by basing his decision on unreferenced circumstances, *and that* procedural errors occurred since the arbitrator did not grant the parties the opportunity to present their views as to whether a particular circumstance was relevant to the interpretation of the Agreement and since the arbitrator interpreted the Agreement in this respect in violation of the parties' instruction.

The Court of Appeal concludes that the circumstances referenced by MHH in this respect as ineligible for the arbitrator to take into consideration do not constitute legally relevant facts, but rather constitute evidentiary and supporting facts in the arbitration. The arbitrator was not precluded from considering these.

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

The same reasons as set out by the Court of Appeal as regards MHH's allegation on a joint instruction to the arbitrator on the correct interpretation of the term "warranties" and of Section 2.4 of the Agreement apply also to procedural errors asserted by MHH in this respect. The Court of Appeal thus concludes that it has not been established that the parties in the arbitration have expressed anything that could be understood as a joint instruction to the arbitrator on the correct interpretation of the Agreement in this respect. Further, there was no obligation for the arbitrator to grant the parties the opportunity to argue their view of the interpretation.

Thus, no excess of mandate or procedural error in the manner maintained by MHH in this respect has been established.

Warranty E – Complete and correct information (challenge grounds 14)

Finally, MHH has maintained that the arbitrator exceeded his mandate by basing his decision on the unreferenced circumstance that there must be a connection between the breaches set out by the arbitrator in paragraph *J41* of the arbitration award and the discontinued cooperation with Kriminalvården in order for MHH to be eligible for damages pursuant to the cross-action.

In this respect, the Court of Appeal notes that the recitals of the arbitration award clearly provide that MHH assumed that the agreement with Kriminalvården was materially important to the valuation of the company. Paragraphs *G22* and *G26* of the arbitration award provide that MHH maintained, amongst other things, that the agreement with Kriminalvården was entirely decisive for MHH's decision to acquire the shares in the Company and that the agreement was the deciding factor for the results of the operations. Paragraph *E7* of the arbitration award, further, provides that MHH as grounds for the cross-action referenced that the Axel Company had withheld the material information that Socialstyrelsen had carried out an inspection, that there were material deficiencies in the operations and that this information would have had deciding influence to MHH's valuation of the Company and its business; if the information had not been withheld from MHH, the acquisition of the shares in the Company had not been completed.

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

Against the background of MHH's framing of its case, the Court of Appeal concludes that as grounds for the cross-action was also the allegation that MHH demanded compensation for damages for the loss of a renewed framework agreement with Kriminalvården. Thus, the arbitrator's review of the dispute in this respect was based solely on the circumstances referenced by MHH. In addition thereto, it should be noted that the arbitrator also considered whether the lack of complete and correct information could have otherwise caused MHH damage (paragraph *J49* of the arbitration award). Against this background, the Court of Appeal concludes that it has not been established that the arbitrator exceeded his mandate in the manner maintained by MHH.

Summarizing conclusion

The conclusions set forth above by the Court of Appeal as regards MHH's referenced challenge grounds entail that MHH's challenge shall be rejected.

Litigation costs

The outcome of the case entail that MHH shall compensate the Axel Company for its litigation costs before the Court of Appeal.

The Axel Company has claimed compensation for litigation costs before the Court of Appeal in the amount of SEK 350,000. Of the claimed amount, ten percent is maintained to relate to costs for a motion for dismissal made by the Axel Company before the Court of Appeal.

MHH has attested an amount of SEK 170,000 as reasonable in and of itself for litigation costs before the Court of Appeal. Since a large part of the Axel Company's submissions have dealt with in-depth discussions of matters of no relevance to the case, the costs in excess thereof cannot, according to MHH, be deemed to have been reasonably justified to protect the Axel Company's interests.

MHH has before the Court of Appeal referenced a relatively large number of circumstances in support of its challenge, which the Axel Company has had

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 2610-13

to argue to protect its interests in the case. The portion of the Axel Company's counsel fees that relate to time spent on criticizing the Court of Appeal's conclusions in the decision concerning the Axel Company's motion for dismissal cannot, particularly since the decision was not subject to appeal, be deemed reasonably required to protect the interests of the Axel Company in the present case. As an estimate, SEK 25,000 of the claimed costs is deemed to relate to this issue. The Court of Appeal concludes that the Axel Company's other litigation costs, having regard to the scope and nature of the case, must be accepted as reasonably justified. Thus, the conclusion of the Court of Appeal is that MHH shall compensate the Axel Company for its litigation costs with an amount of SEK 325,000.

Appeal

Pursuant to the second paragraph of Section 43 of the Swedish Arbitration Act, the Court of Appeal's judgment may be appealed only if the court deems it important for the development of case law that an appeal is reviewed by the Supreme Court.

The Court of Appeal does not find that there are grounds to grant leave to appeal the decision.

The judgment of the Court of Appeal may not be appealed.

[ILLEGIBLE SIGNATURES]

The decision has been made by: Senior Judge of Appeal CL, Judge of Appeal UB, reporting Judge of Appeal, and Associate Judge TB.